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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

KENT SCHOOL DISTRICT NO. 415  
and SAVAGE ENTERPRISES, INC.,

Appellants,

v.

PUGET SOUND AIR POLLUTION CONTROL  
AGENCY,

Respondent.

PCHB Nos. 86-190  
and 86-195

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER involves appeals by Kent School District No. 415 ("District") and Savage Enterprises, Inc. ("Savage") of the Puget Sound Air Pollution Control Agency's ("PSAPCA") September 30, 1986 Notice and Order of Violation (No. 6509) for alleged violations of Regulation I, Section 10.05(a) and WAC 173-400-075 in the handling of asbestos materials on June 27, 1986. The appeals, filed on October 27, 1986 and October 30, 1986, were consolidated for hearing.

The formal hearing was held on June 18, 1987 in Seattle, Washington. Member Judith A. Bendor was present for the Board. Appellant District was represented by Richard K. Clarke, Jr., Director

1 of Maintenance and Operations. Appellant Savage was represented by  
2 Attorney Doug Elston. PSAPCA was represented by Attorney Keith D.  
3 McGoffin. Court Reporter Cheri L. Davidson of Gene Barker &  
4 Associates recorded the proceedings.

5 Witnesses were sworn and testified. Exhibits were admitted and  
6 examined. Argument was heard. Without objection, an exhibit was  
7 filed after the hearing, which was examined. From the foregoing, the  
8 Board issued a proposed Order, to which the parties filed exceptions.  
9 Thereafter, Board Members Wick Dufford and Lawrence J. Faulk reviewed  
10 the record. From the foregoing, this Final Order issues:

11 FINDINGS OF FACT

12 I

13 The Puget Sound Air Pollution Control Agency is an activated air  
14 pollution control authority under the terms of the State of Washington  
15 Clean Air Act. PSAPCA has filed with the Board certified copies of  
16 its Regulations I and II, of which the Board takes official notice.

17 II

18 Kent School District No. 415 operates O'Brien Elementary School,  
19 which is located at 6804 South 212, Kent, Washington, the site where  
20 the violations were alleged to have occurred. The District contracted  
21 with Mechanical Systems, Inc., ("Mechanical") to replace pipes in the  
22 school. Savage Enterprises, Inc.'s place of business is in Seattle,  
23 Washington. It specializes in asbestos-removal work. It was hired by  
24

25  
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1 Mechanical to remove asbestos insulation from the pipes' points of  
2 connection. According to the Notice of Intent to Remove Asbestos  
3 which Savage filed with PSAPCA, 250 linear feet of insulation were to  
4 be removed or encapsulated.

5 Mechanical was not named in PSAPCA's Notice and Order, and is  
6 therefore not a party to this appeal.

7 III

8 The Notice and Order of Civil Penalty alleges that the District  
9 and Savage violated Section 10.05(a) of Regulation I on or about  
10 June 27, 1986 at the O'Brien School by failing to adequately wet  
11 removed asbestos and seal in leak-tight containers while wet. A  
12 \$1,000 penalty was assessed.

13 IV

14 Asbestos is a substance which has been specifically recognized for  
15 its hazardous properties. It is one of only eight pollutants  
16 classified pursuant to Section 112 of the Federal Clean Air Act for  
17 the application of National Emission Standards for Hazardous Air  
18 Pollutants (NESHAPS). It is a substance which by Federal Clean Air  
19 Act definition:

20 causes, or contributes to, air pollution which may  
21 reasonably be anticipated to result in an increase in  
22 mortality or an increase in serious irreversible, or  
incapacitating reversible illness. Section 112.

23 See, Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18,  
24 1987).

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V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10. PSAPCA's regulations govern work practices.

VI

The avowed purpose of federal, state and local asbestos work practice regulations is to prevent the release of asbestos fibers into the air. See, 40 CFR 61.147; See, McFarland Wrecking Corp. v. PSAPCA, PCHB No. 86-159 (April 20, 1987). University of Washington, et al. v. PSAPCA, PCHB No. 86-212 Order Denying Summary Judgment, (April 10, 1987). Such regulations are intended to provide the public with an ample margin of safety. A violation of PSAPCA regulations can therefore be committed without any demonstration that emissions occurred.

VII

On June 27, 1986, at approximately 2:00 p.m., as a result of the Notice of Intent to Remove, a PSAPCA inspector accompanied by an inspector from the Department of Labor and Industries went to the school. The PSAPCA inspector contacted the school custodian, the only school employee present, who showed them around the asbestos removal project. There were no asbestos removal personnel around.

1 In the boiler room, dry friable material was seen in several  
2 different places, on the floor and hanging on pipes. A school district  
3 employee had a desk in the room which he used for his office.  
4 Photographs and two samples were taken. One sample was taken near the  
5 connecting point of a pipe below a sink. Another was taken from the  
6 floor below the sink. The samples were labeled and a data sheet/chain  
7 of custody form completed. Test results showed the samples on the pipe  
8 contained asbestos - 65% amosite and 20% chrysotile. The floor sample  
9 also contained asbestos - 10% chrysotile.

#### 10 VIII

11 There was no removal equipment nor containment present, and the area  
12 was accessible to people. By June 27, 1986 -- Savage had completed the  
13 removal project. A Notice of Violation was sent to the District and  
14 Savage on July 7, 1986 and a Notice and Order of Civil Penalty sent  
15 September 30, 1986, from which appellants timely appealed.

#### 16 IX

17 The sole witness called by appellants at the hearing was Mr. James  
18 A. Walsh, President of Savage. Mr. Walsh testified as to the company's  
19 overall general policy and practice, but he had not been personally  
20 on-site from at least June 25 through June 27, and had no personal  
21 knowledge of how or on which specific pipes his employees did their  
22 work. Fourteen hours were spent by his employees on the project.  
23

X

No Savage personnel came to the site until two weeks after the alleged violation, when Mr. Walsh visited it to observe the scene.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

#### CONCLUSIONS OF LAW

##### I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under PSAPCA regulations implementing the Washington Clean Air Act, Chapter 70.94 RCW.

##### II

On the basis of the record before us, we conclude that the preponderance of the evidence demonstrates that the parties committed the violations asserted. Such evidence includes inferences reasonably drawn. We also conclude that under RCW 70.94.431, the penalty assessed should be affirmed.

##### III

The Washington Clean Air Act is a strict liability statute and conduct in violation of its implementing regulations are not excused on the basis of absence of intent. Kemp, supra; PCHB No. 86-163. See, RCW 70.94.040. In addition, parties cannot, through contractual provisions, delegate the duty to handle this inherently dangerous asbestos to another party. Kemp, supra. See, Island Sea Farms, Inc. v.

1 Foster & Marshall Realty, 42 Wn. App. 308, 711 P.2d 1049 (1985).

2 Therefore, Kent School District is liable for such acts by its  
3 sub-contractor Savage which violate the Clean Air Act and its  
4 implementing regulations.

5 IV

6 PSAPCA Regulation I at Section 10.05 states in pertinent part:

7 (a) It shall be unlawful to cause or allow the  
8 disposal of asbestos material unless the procedures in  
Subsections 10.05(b) and (c) are followed.

9 (b) One of the following disposal methods  
10 shall be used during the collection, processing,  
packaging, transporting or deposition of any  
asbestos-containing waste material;

11 (1) Treat all asbestos-containing waste  
material with water as follows:

12 (i) Mix asbestos waste from  
control devices with water to form a slurry; adequately  
13 wet other asbestos-containing waste material; and  
[ . . . ]

14 (iv) After wetting, seal all  
asbestos-containing waste material in leak-tight  
15 containers while wet.

16 V

17 Section 10.05 of PSAPCA Regulation I deals with the disposal of  
asbestos-containing material, in contrast with Section 10.04 which  
18 governs the practices during the removal itself. See, McFarland,  
19 supra. Both during removal and prior to completion of a job, all  
20 asbestos is to be disposed of properly. Since Savage had completed the  
21 project, appellants' legal duty to specifically comply with Section  
22 10.05 had clearly arisen. By leaving dry friable asbestos material on  
23 the pipe, Savage and Kent School District by operation of law violated  
24 Section 10.05 of Regulation I.

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VI

Appellant Savage contests the sufficiency of evidence, contending that it was not proven that it worked on the particular pipe sampled. This is a civil case, in which the respondent's burden of proof is by a preponderance of the evidence. Reasonable inferences may be drawn. The evidence is uncontroverted that Savage removed asbestos from pipes in the boiler room, and in particular from areas near connections, from which one sample was taken. Neither appellant Savage nor the District provided any direct evidence on which particular pipes were worked on. Under such facts, with reasonable inferences drawn we conclude that it is more likely than not that appellant failed to properly dispose of the asbestos on the pipe in violation of Section 10.05.

We conclude, however, that the evidence was insufficient to prove that the asbestos material on the floor was due to Savage's work. The composition of the asbestos on the pipe and the floor sample below it differed.

VII

Since the appellants are joint tortfeasurs, jointly and severally liable for the penalty, as is our usual practice we decline to apportion the penalty. See, Kemp, supra.

The purpose of civil penalties is to promote future compliance with the law, both by these parties and the public at large. AK-WA, Inc. v. PSAPCA, PCHB No. 86-111 (February 13, 1987). The reasonableness of penalties is based upon several factors, including the scope of the



1 violation and the parties' past and subsequent conduct. Kamloops  
2 Investment Corporation v. PSAPCA, PCHB No. 86-100 (September 29, 1986).

3 In this instance, the asbestos was left in an area of a school  
4 accessible to people. Moreover, appellant Savage did not rectify the  
5 problem. Fully two weeks after the inspection elapsed before Savage  
6 even visited the school. We therefore find the \$1,000 penalty  
7 appropriate.  
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ORDER

Therefore, the Notice and Order of Violation with penalty in the amount of \$1,000 is AFFIRMED.

DONE this 6th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor  
JUDITH A. BENDOR, Presiding

Wick Dufford  
WICK DUFFORD, Chairman

Lawrence J. Faulk 11/6/87  
LAWRENCE J. FAULK, Member